



United States Department of Justice
Executive Office for Immigration Review
Office of the Chief Immigration Judge

Chief Immigration Judge

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MEMORANDUM TO: All Assistant Chief Immigration Judges
All Immigration Judges
All Court Administrators
All Support Staff

FROM: The Office of the Chief Immigration Judge

SUBJECT: Interim Operating Policy and Procedure
Memorandum 97-3: Procedures for Credible
Fear and Claimed Status Reviews

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I. INTRODUCTION

Section 235(b)(1) of the Immigration and Nationality Act (INA)¹ provides for expedited removal of certain inadmissible aliens. Specifically, those arriving aliens deemed inadmissible to the United States pursuant to INA sections 212(a)(6)(C)(fraud or misrepresentation) or 212(a)(7)(lack of proper documents) shall be ordered removed from the United States by an officer of the Immigration and Naturalization Service (INS) without referral for a hearing before an Immigration Judge.² Even in the expedited removal process, however, there are two procedures that will permit such cases to be docketed with the Immigration Court - credible fear and claimed status reviews.

A. CREDIBLE FEAR REVIEW

The first procedure relates to review of credible fear determinations. The credible fear standard is defined as "a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 208." INA section 235(b)(1)(B)(v). In addition, the regulations make it clear that the Immigration Judge's review is a de novo review of the INS's credible fear determination. 8 C.F.R. section 3.42(d).

¹ All references to the INA are to that statute, as amended, including amendments made by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), enacted as Division C of the Departments of Commerce, Justice, and State, and the Judiciary Appropriations Act for 1997, Pub. L. No. 104-208, 110 Stat. 3009 (September 30, 1996).

² There are certain exceptions. For example, stowaways are ineligible to apply for admission under INA section 235(a)(2) and 8 C.F.R. section 235.1(d)(4), and Cubans who arrive by air at a port of entry in accordance with INA section 235(b)(1)(F) and 8 C.F.R. section 235.3(b)(1)(i), are not processed through expedited removal. In addition, a special process exists for aliens removable under INA section 235(c) where the immigration officer or Immigration Judge suspects that the alien is inadmissible under INA section 212(a)(3)(A)(i)(I) or (A)(iii)(Security related grounds). 8 C.F.R. section 235.8.

If an alien in expedited removal expresses a fear of persecution, or an intention to apply for asylum, that alien will be referred to an INS officer for a credible fear determination. If the INS officer determines that the alien has not established a credible fear of persecution (and an INS supervisor concurs), the alien may request review of that determination by an Immigration Judge on the INS Record of Negative Credible Fear Finding and Request for Review by Immigration Judge (INS Form I-869). That review must be "concluded as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no event later than 7 days after the date of the determination [by the supervisory asylum officer]" INA section 235(b)(1)(B)(iii)(III).

B. CLAIMED STATUS REVIEW

The second procedure permits an alien in expedited removal who claims under oath to be a United States citizen³, to have been lawfully admitted for permanent residence, to have been admitted as a refugee, or to have been granted asylum, to obtain review of that claim by an Immigration Judge where INS determines that the alien has no such claim (claimed status review).⁴ Although not required by statute or regulation, claimed status review cases (except cases involving claims to United States citizenship)⁵ will be heard, to the maximum extent practical, within the same time frame as credible fear review cases (within 24 hours to the extent practicable, but not more than 7 days from the filing of the charging document). See section III entitled "Filing of Charging Document."

II. CASE SCHEDULING - CREDIBLE FEAR AND CLAIMED STATUS

³ The interim regulation, effective April 1, 1997, includes claimed status review for aliens who claim under oath to be United States citizens. See 8 C.F.R. section 235.3(b)(5).

⁴ See 8 C.F.R. section 235.6(a)(2)(ii).

⁵ Claims to United States citizenship are often complex and may require that the alien obtain documentation to support the claim. Nevertheless, these cases will be heard as expeditiously as possible.

REVIEWS

It is anticipated that the majority of these cases will be heard at established INS detention centers (Service Processing Centers (SPCs) and contract facilities). However, we also anticipate that the INS will detain these aliens at other locations,⁶ necessitating courts that do not normally hear detained cases to hear credible fear or claimed status review cases.⁷ For the present time, the Immigration Court will not use the Interactive Scheduling System (ISS) to calendar credible fear or claimed status review cases. As that technology becomes more widely implemented, we will revisit this issue.

The Assistant Chief Immigration Judges, in coordination with the Court Administrators, will establish credible fear review calendar time in the Judges' agendas. This will permit dedicated docket time for these cases, in the same way that we established asylum (MA and IA) time in 1995 for expedited asylum cases.

III. FILING OF CHARGING DOCUMENT

The charging document for credible fear and claimed status review cases is the Notice of Referral to Immigration Judge (Form I-863).⁸ This document is considered to be a charging document in accordance with 8 C.F.R. section 3.13, and thus jurisdiction vests with the Immigration Court upon its filing. 8 C.F.R. sections 3.14 and 3.42(a). The INS should file the Form I-863 with the same court that they would file any other charging document. Therefore, base cities with detail sites will accept filings of the Form I-863 in the same manner currently utilized for filing other charging documents. However, because time is of the essence with regard to these expedited cases, and if distance from the

⁶ See 8 C.F.R. section 235.3(e) relating to detention in non-Service facilities.

⁷ INA section 235(b)(1)(B)(iii)(IV) provides that an alien in expedited removal "shall be detained pending a final determination of credible fear of persecution" The regulations provide for release on parole for medical emergencies or for a legitimate law enforcement objective. 8 C.F.R. sections 235.3(b)(2)(iii) and (b)(4)(ii) (credible fear review cases); 8 C.F.R. section 235.3(b)(5)(i) (claimed status review cases).

⁸ 8 C.F.R. section 235.6(a)(2).

court renders it impractical for the INS to file the Form I-863 and accompanying documents in person, the Court Administrator shall establish a procedure to allow for the filing of these documents by fax. Filing by fax shall be limited only to credible fear and claimed status review cases. The procedure established by the Court Administrator shall be forwarded to the District Directors/Officers-in-Charge; District Counsels/Sector Counsels; and to all INS offices within the jurisdiction of the local immigration court. Such procedure will also include a method for immediate telephonic confirmation by the INS that the Form I-863 filed via fax has been received by the immigration court.

Court Administrators will also establish a system to ensure prompt ANSIR data entry and ROP creation. For example, a separate box could be set aside into which Forms I-863 would be placed, and certain staff could be designated to regularly check, retrieve and create ROPs during the course of each business day for any new filings (i.e., every hour or half hour).

A. CREDIBLE FEAR REVIEW

The regulations provide that the INS shall also file the "written record" along with the Form I-863. 8 C.F.R. section 3.42(a). The statute defines the record to include "a summary of the material facts as stated by the applicant, such additional facts (if any) relied upon by the officer, and the officer's analysis of why, in light of such facts, the alien has not established a credible fear of persecution. A copy of the officer's notes shall be attached to the written summary." INA section 235(b)(1)(B)(iii)(II); see also 8 C.F.R. sections 208.30(f) and 235.3(b)(2)(i). Therefore, the Immigration Court should receive the Form I-863; the Record of Sworn Statement in Proceedings Under Section 235(b)(1) of the Act (Form I-867AB); the Notice and Order of Expedited Removal (Form I-860);⁹ the Record of Negative Credible Fear Finding and Request for Review by Immigration Judge (Form I-869); the Record of Determination/Credible Fear Worksheet (INS APS0 Form E), and any other materials, such as the INS officer's notes, that are filed with the Form I-863.

⁹ The alien signs the reverse of this form acknowledging receipt.

B. CLAIMED STATUS REVIEW

In claimed status review cases, the INS will file with the court, the Form I-863 and the expedited order of removal (Form I-860) issued by the immigration officer. 8 C.F.R. section 235.3 (b)(5).

No other documents are required to be filed by the INS.

IV. CREATION OF THE RECORD OF PROCEEDING

A Record of Proceeding (ROP) will be created for each credible fear and claimed status review case. ROPs for these cases will be RED in color. Court Administrators must ensure that ROPs are created expeditiously. The goal should be to have the ROP created within 2 hours of having received the charging document. A tape envelope shall be included in each ROP.

Both credible fear and claimed status review case ROPs should be set up such that the left side of the ROP will contain the Immigration Judge worksheet (administrative side) and the right side should contain the Form I-863, any submissions filed along with the Form I-863, any written hearing notice(s) and the tape envelope. Tapes and ROP labeling should be done according to the Uniform Docketing System Manual.

A. CREDIBLE FEAR REVIEW

The regulations provide that the ROP in credible fear review cases shall NOT be merged with any later proceeding involving the same alien. 8 C.F.R. section 3.42(b). Once the hearing is completed, the ROP can be retired, utilizing the same procedure as with any other ROP retirement.

B. CLAIMED STATUS REVIEW

If the Immigration Judge determines that the alien has no claim to status and thus affirms the expedited removal order of the immigration officer, the ROP should be filed with the closed record files and retired according to the Uniform Docketing Manual. However, if the Immigration Judge finds that the alien has established a claim to status, the order of the immigration officer will be vacated and proceedings will be terminated. In this instance, the INS can elect to place the alien in proceedings under section 240 of the INA. 8 C.F.R. 235.3(b)(5)(ii). Should the alien be placed in 240

proceedings, the claimed status ROP should be merged with the ROP created for the 240 proceedings.

V. NOTICE OF THE PROCEEDING - CREDIBLE FEAR AND CLAIMED STATUS REVIEWS

Special hearing notices have been created in ANSIR for these cases. For credible fear review cases, the hearing notice is entitled "Notice of Review of Credible Fear Determination." For claimed status review cases, the hearing notice is entitled "Notice of Review of Claimed Status."

These hearing notices should be served in person, if practicable. If in-person service is not practicable, then the hearing notice must be sent to the alien in care of his or her custodial authority by an appropriate overnight courier. Due to the expedited nature of the proceedings, we should attempt to serve the hearing notice within 24 hours of receiving the Form I-863.

VI. CONDUCT OF THE PROCEEDING - CREDIBLE FEAR AND CLAIMED STATUS REVIEWS

The regulations provide that "credible fear determinations may be reviewed by the Immigration Judge by telephone conference call without the consent of the alien." 8 C.F.R. section 3.25(c). Therefore, it is anticipated that where the alien is detained at a location remote from an immigration court, credible fear reviews will be conducted by telephone conference. Additionally, those courts equipped with video teleconferencing equipment may use it to conduct the proceedings. However, where aliens are detained at the same location as the Immigration Court (SPCs, contract facilities), the review may proceed in person.

The Immigration Judge must tape record the review. Although the tape will not normally be transcribed, the tape will remain in the ROP.

The Immigration Judge may "receive into evidence any oral or written statement which is material and relevant to any issue in the review." 8 C.F.R. section 3.42(c). This regulatory provision must be interpreted in harmony with the fact that the credible fear review, as well as claimed status review proceedings takes place within the context of expedited removal, however at the same time the court is responsible for ensuring that due process is maintained.

Credible fear review proceedings should not be as in-depth as a full asylum hearing. All requests for continuance must be considered in light of the

statutorily-mandated time frames for such review and the fact that these proceedings occur within the context of expedited removal.

If an interpreter is necessary, the Immigration Court shall provide one. 8 C.F.R. section 3.42(c). If there is sufficient advance notice, then a contract interpreter shall be ordered. However, given the expedited nature of these reviews, the AT&T Language Line will be used extensively in both credible fear and claimed status review proceedings. The Court Administrator should contact the AT&T Language Line to alert them of the need for expedited access for these proceedings.

There is no right to representation prior to or during the review, either in the statute or the regulation.¹⁰ However, the alien can consult with a person, which could be an attorney. Should the alien consult with an attorney, there is no need to require submission of a Notice of Entry of Appearance (Form EOIR-28).

VII. IMMIGRATION JUDGE'S ORDER - CREDIBLE FEAR AND CLAIMED STATUS REVIEWS

For credible fear review cases, the Immigration Judge must complete the Credible Fear worksheet and render a prompt decision. The decision of the Immigration Judge shall be made on the standard order entitled Immigration Judge Decision on Credible Fear Review. If the Immigration Judge finds that the alien has not established a credible fear, or has failed to establish the claimed status, the order of the INS officer will be affirmed and the case remanded to the INS for execution

¹⁰ The statute provides that "[an alien who is eligible for a [credible fear] interview may consult with a person or persons of the alien's choosing prior to the interview or any review thereof, according to regulations prescribed by the Attorney General." INA section 235(b)(1)(B)(iv); 8 C.F.R. section 235.3(b)(4)(ii). The regulations provide that "[t]he alien may consult with a person or persons of the alien's choosing prior to the review." 8 C.F.R. section 3.42(c). In the discretion of the Immigration Judge in an individual case, persons with whom the alien consulted may be present at the review. However, nothing in the statute, regulations or this OPPM entitles an attorney to make an opening statement, call and question witnesses, cross examine, object to written evidence, or make a closing argument.

of the expedited removal order.¹¹ If the Immigration Judge finds that the alien has established a credible fear, or established the claimed status, then the Immigration Judge shall vacate the INS's order (made on Form I-860) and return the case to the INS for further appropriate action.¹² 8 C.F.R. sections 3.42(f) and 208.30(f). There is no appeal from these decisions. Therefore, no Notice of Appeal (Form EOIR-26) shall be given to the alien, and these cases shall not be placed in any call-up system for the filing of appeals subsequent to the decision of the Immigration Judge.

VIII. ROP FILING AND RETIREMENT

The filing of the ROPs and retirement should be done in conformity with the instructions set forth in the Uniform Docketing Manual. Reference the manual for instructions.

Any questions concerning these procedures should be directed to your Assistant Chief Immigration Judge.

Michael J. Creppy
Chief Immigration Judge

¹¹ This is the language of 8 C.F.R. section 3.42(f). However, 8 C.F.R. section 208.30(f)(2) provides that "[i]f the Immigration Judge concurs with the determination of the asylum officer that the alien does not have a credible fear of persecution, the case shall be returned to the Service for removal of the alien." The outcome is the same, and the standard judge's order will ensure uniformity.

¹² For credible fear cases, the INS shall institute removal proceedings, during which the alien will have the opportunity to apply for asylum. 8 C.F.R. section 3.42(f). For claimed status review cases, the INS may institute removal proceedings (except, obviously, for cases involving U.S. citizens). 8 C.F.R. section 235.3(b)(5)(iv).